No. 126, Original

In The

Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO

On Motion For Leave To File Bill Of Complaint

KANSAS' REPLY TO NEBRASKA'S BRIEF IN OPPOSITION AND TO NEBRASKA'S REQUEST FOR ORAL ARGUMENT

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REPLY TO NEBRASKA'S REQUEST FOR ORAL ARGUMENT

The State of Nebraska has requested oral argument on Kansas' Motion For Leave to File Bill of Complaint.[1] It is not common for the Court to grant oral argument on a Motion For Leave to File Bill of Complaint, and this case is similar to cases where the Court did not require oral argument at this stage of the proceeding. See, *e.g.*, *Texas v. New Mexico*, 421 U.S. 927 (1975); *Kansas v. Colorado*, 475 U.S. 1079 (1986); *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (all granting leave without oral argument). This case presents important and focused questions, of a type with which the Court has previously dealt, concerning the allocation of waters between the States of Kansas and Nebraska pursuant to the Republican River Compact ("Compact"). The controversy between the States over whether Nebraska is increasingly violating the Republican River Compact raises important questions of both fact and law, issues that cannot be resolved by oral argument at this early stage of the proceeding. Therefore, oral argument on the threshold issues presented by the Motion For Leave to File Bill of Complaint appears to be unnecessary.

REPLY TO NEBRASKA'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Kansas' Motion For Leave to File Bill of Complaint presents two issues, namely, whether the seriousness and dignity of Kansas' claim is sufficient to justify exercise of the Court's original jurisdiction and whether an alternative forum is available for resolution of that claim. In response, Nebraska raises other ancillary, but ultimately irrelevant, issues that will also be addressed.

As to the first issue, there is a serious interstate claim by Kansas that water use in the Republican River Basin in

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[1] Brief of the State of Nebraska and Request For Oral Argument in Opposition to Kansas' Motion For Leave to File Bill of Complaint ("Neb. Brief") 1.

Nebraska must be regulated in order to bring Nebraska into compliance with the Republican River Compact. Nebraska does not deny its failure to control groundwater use, nor does it deny exceeding its Compact allocation in many years. Yet Nebraska persists in its denial that groundwater pumping is subject to the Republican River Compact.

Nebraska essentially admits a violation of the Compact in 1992, and the evidence will show, if the Motion for Leave is granted, that Nebraska has submitted figures to the Republican River Compact Administration ("RRCA") that document violations in many years. Once the effects of the enormous and undocumented Ogallala pumping are quantified and added to the consumptive use figures admitted to by Nebraska, together with appropriate adjustments, the full magnitude of Nebraska's violations of the Republican River Compact will become apparent.

Kansas has suffered severe injury as a result of Nebraska's violations of the Republican River Compact. Nebraska's illegal well depletions have deprived Kansas irrigators of significant quantities of water that would otherwise have been put to beneficial consumptive use. Contrary to the representations by Nebraska, the waters supplied by the Republican River are utilized in Kansas to irrigate many thousands of acres and to supply municipal, industrial and other needs as they flow through the most populous part of the State of Kansas.

As to the second issue, there is no viable alternative forum in which the resolution of Kansas' claims under the Republican River Compact can be achieved. As this Court has impliedly recognized in previous cases enforcing interstate water allocations between states, such claims are appropriately resolved only in the exclusive original jurisdiction of this Court. The other forums proposed by Nebraska are not available.

Superficial statements by Nebraska of Compact compliance based on its misinterpretation of data submitted to the Republican River Compact Administration should not dissuade this Court from allowing Kansas to prove its case.

ARGUMENT[2]

A. The Seriousness and Dignity of Kansas' Claim Warrant Exercise of the Original Jurisdiction.

The Court looks first to the seriousness and dignity of the claim to determine whether to exercise its original jurisdiction. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). In this case, the State of Kansas seeks to bring a sovereign claim against another State. By resolving Kansas' claim, this Court will be fulfilling an important and unique responsibility within the overall federal system. See, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). Indeed, in discussing its role with respect to enforcement of the Pecos River Compact, 63 Stat. 159 (1949) in that case, the Court said:

> "Texas' right to invoke the original jurisdiction of this Court was an important part of the context in which the Compact was framed. " 462 U.S., at 569.

Kansas occupies here much the same place Texas occupied in the Pecos litigation.

Nebraska falls into error in the very first section of its Argument. It suggests, on the basis of *New York v. New Jersey*, 256 U.S. 296 (1921), that "the threatened invasion of rights must be of **serious magnitude** and it must be established by **clear and convincing evidence**" before the Court should grant a motion for leave to file. Neb. Brief 8 (emphasis Nebraska's). Yet that case was not a compact enforcement case, and the language appeared in an opinion issued 13 years after leave to file had been granted. See, *id.*, at 256 U.S. 296, 301, 308-309. And even absent a compact, the Court said that "the right of the state to maintain such a suit as is stated in the bill is very clear." *Id.*, at 301-302.

B. Kansas Has Sufficiently Pled Its Claim for Violation of the Republican River Compact.

Nebraska asserts that "[a]lthough the conclusory allegations in Kansas' Bill of Complaint might be enough to avoid a motion to

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[2] The Argument generally tracks the organization of the Nebraska Brief to facilitate comparison of the States' positions on each point.

dismiss at the federal district court level, they are wholly insufficient when presented to this Court with the rights of sovereign states at issue." Neb. Brief 9. No authority for this statement is given. On the contrary, Kansas' Bill of Complaint is fully sufficient. Commenting on the normal requirement of a "short and plain statement" (see Sup Ct. R. 17.2; Fed. R. Civ. P. 8), Wright and Miller state, "The evidentiary material supporting these general statements normally should not be set out in the pleadings but rather should be left to be brought to light during the discovery process." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1281, p. 519 (2d ed. 1990) (footnote omitted). When Nebraska itself was seeking to amend its pleadings in its ongoing original case, the Court said:

> "Purely speculative harms will not, of course, carry Nebraska's burden of showing substantial injury, but at this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995).

Moreover, in an interstate suit seeking enforcement of an established apportionment of interstate waters, injury need not be pled at all. See *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) ("In an enforcement action, the plaintiff need not show injury.").

Finally, Nebraska asks for a standard that its own initial pleading in *Nebraska v. Wyoming*, No. 108, Orig. would not have met. *Compare* Petition For An Order Enforcing Decree and For Injunctive Relief ¶ 3, *Nebraska v. Wyoming*, No. 108, Orig. (filed Oct. 7, 1986) *with* Neb. Brief 9.

C. Nebraska's Allegations Concerning Compact Administration Data Are Incorrect.

1. Nebraska Misconstrues Its Obligation to Deliver Water to Kansas.

Aside from the misrepresentations noted below, the most serious problems with Nebraska's superficial attempt to graph Kansas' mainstem allocations versus deliveries to Kansas are: (1) Nebraska fails to account for the mainstem delivery right of Kansas at Guide Rock during the irrigation season, and (2) Nebraska fails

to account for the consumptive use of water by all wells affecting the Republican River, including Ogallala wells, the need for which is confirmed in the formulas for computing consumptive use adopted by the Republican River Compact Administration. See RRCA, Formulas for the Computation of Annual Virgin Water Supply and Consumptive Use 7 (rev'd 1990).

In part C.1 of its Brief in Opposition, Nebraska discusses the graph that appears in Appendix B thereto. It is claimed that the graph "was compiled from official Compact calculations approved by representatives of all three states at annual meetings of the Compact Commission. " Neb. Brief 10-11. This is not true in several respects. For instance, the graph in Appendix B purports to show the mainstem allocation tc Kansas under the Compact and the actual amount of water delivered to Kansas based on official Compact Administration data for the years 1959 through 1994. As to the actual amount of water delivered to Kansas 1959-1994, and annual allocations 1959-1977, the annual reports of the Republican River Compact Administration contain no such data. See RRCA, 1st-35th Annual Reports (1961-1995).

2. Kansas Has Suffered Substantial Injury as a Result of Nebraska's Compact Violations.

Nebraska asserts that Kansas has suffered no injury. Neb. Brief 12-13. Nothing could be further from the truth. This statement by Nebraska is based again on alleged "Compact figures" for deliveries to Kansas. As pointed out above, there are no such "Compact figures" adopted or published by the Compact Administration.

The consumptive use figures cited by Nebraska disregard almost all Kansas uses of Republican River water.[3] In other words, when Nebraska says that Kansas is not using the water delivered to it, it is disregarding almost all the irrigation, municipal, industrial and other uses made of Republican River water in Kansas other than the net consumptive use of the Kansas Bostwick Irrigation

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[3] The data submitted to the RRCA has never included consumption of water diverted below the Stateline. See, RRCA, 1st-37th Annual Reports (1961-1997).

District ("KBID"). Almost 40% of Kansas' population lives in the watershed downstream of Hardy. Bureau of Census, U.S. Dep't of Commerce, 1990 Census of Population & Housing, Kansas, Table 4 (1993). Water rights authorized for the same reach amount to more than half a million acre-feet per year. Division of Water Resources, Kansas Dep't of Agriculture, Water Rights Information System (1997).

Nebraska has not delivered water at Guide Rock as required by the Compact. See Compact, Art. IV ("provided that Kansas shall have the right to divert all or any portion thereof at Guide Rock, Nebraska;. "). This failure by Nebraska has injured the many Kansas irrigators under the Kansas Bostwick Irrigation District because their water is diverted at Guide Rock. In turn, diversions at Guide Rock depend critically on inflows to Harlan County Reservoir. See Kansas Brief in Support of Motion For Leave to File Bill of Complaint ("Kan. Brief") 5-7. The inflows to that reservoir have steadily decreased in conjunction with the proliferation of wells in Nebraska. See Kan. Brief 4. Attached to this brief as Appendix A is a graph of actual inflows into Harlan County Reservoir for the water years 1961-1994 versus the Bureau of Reclamation ("BOR") average projected annual inflow.

Nebraska concludes its argument that Kansas has suffered no injury by quoting passages from the opinion and the dissent in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Neb. Brief 13. *Nebraska v. Wyoming* was a case quite different from the present controversy. In that case an equitable apportionment of the North Platte River had been sought, and the opinion quoted was issued 11 years after the motion for leave had been granted and after substantial evidence had been taken by a special master. See 325 U.S., at 591, 608; 293 U.S. 523 (1934).

3. Nebraska's Overuse Has Depleted Critical Reservoir Inflows.

Nebraska accuses Kansas of proceeding "from the unfounded premise that [Harlan County Reservoir], or any other federal reservoir, was intended to fill every year." Neb. Brief 14. This assertion is not true. The Kansas premise is that inflows should occur as projected by the BOR. Appendix A to this Brief shows

that the inflows continue to decrease far below the BOR's projections.[4] The total net shortfall in inflows to Harlan County Reservoir for the water years 1961-1994 amounts to well over four million acre-feet. See BOR, U.S. Dep't of Interior, Definite Plan Report, Bostwick Division Vol. 1, Part 3, App. II (1953); Resource Management Assessment, Republican River Basin 29 (1996). Kansas and Nebraska water users who depend on the reservoir for irrigation water have therefore been injured.

4. RRCA Annual Reports Show Consistent Nebraska Overuse.

Nebraska has reported subbasin overuse in thirty-three of the thirty-four years from 1961 through 1994 in its submittals to the Republican River Compact Administration. See RRCA, 2nd-35th Annual Reports (1962-1995). But Nebraska seeks to avoid the consequences of its subbasin overuse by netting out its consumptive use above Guide Rock against flows that appear only below Guide Rock. See Neb. Brief 14-15, App. G. Such netting out is wrong because it disregards Kansas' Compact right to divert at Guide Rock. See Kan. Brief 6.

5. The Compact Administration is Deadlocked.

Nebraska states in its brief that because Kansas has not provided data to the Compact Administration, it comes to this Court with "unclean hands." Neb. Brief 16-17. This is unfounded. As has occurred in the context of other interstate water compacts, see, *e.g.*, *Texas v. New Mexico*, 462 U.S. 554, 561-562 (1983), the Compact Administration is deadlocked regarding the appropriate method to account for consumptive use and virgin water supply. Because of this deadlock, **no state** has supplied consumptive use

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[4] The depletion of inflows to Harlan County Reservoir is largely the result of groundwater overdraft above that reservoir. See Kan. Brief 4-5. As this Court has recognized, "Groundwater overdraft is a national problem. " *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982) (discussion with respect to the Ogallala aquifer in the Republican River Basin). Water in downstream Lovewell and Milford Reservoirs cannot compensate for losses to Harlan County Reservoir.

data to the Compact Administration for water years since 1995. See RRCA, 36-37th Annual Reports (1996-1997).

D. No Alternative Forums Exist in Which Kansas' Claims Can be Addressed.

1. U.S. District Court is Not Available.

Despite the exclusive nature of this Court's original jurisdiction under 28 U.S.C. § 1251(a), Nebraska suggests that Kansas' claim could be considered in a federal district court. Neb. Brief 17-18. Nebraska states that the KBID "has the right to commence an action in federal district court if there is cause to believe that any Nebraska state or local official, entity, or citizen has interfered with the District's water delivery contracts with the federal government."[5] Neb. Brief 18. The argument by Nebraska misapprehends the fundamental nature of the claim being made by the State of Kansas. Kansas' claim cannot be made by any other party because it is uniquely a sovereign claim against another sovereign.

Kansas brings this action as a sovereign party to the Compact. As such, it asserts a sovereign interest in enforcing its rights under the Compact. Kansas' demand for recognition of these rights by another sovereign is an "easily identified" sovereign interest that is properly asserted in this interstate action. See *Alfred L. Snapp & Son v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (States' authority to apportion waters of interstate stream by compact is equivalent to their authority to adjust State boundaries by compact, which is "a part of the general right of sovereignty") (quoting *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837)).

This Court has stated that it has "complete judicial power to adjudicate disputes among [States] . and this power includes the capacity to provide one State a remedy for the breach of another." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (citation omitted).

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[5] Litigation between water users in different states was enjoined by this Court on the Arkansas River. See *Colorado v. Kansas*, 320 U.S. 383, 386-388, 400 (1943).

As this Court has said, after pointing out that a compact is a contract, "A court should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for." *Id.* at 128-129 (citations omitted). This Court is the only court that can provide such remedy. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a); *Mississippi v. Louisiana*, 506 U.S. 73 (1992).

2. There Are No "Compact Alternatives."

In a general sense, the States have already chosen the "Compact alternative" by entering into the Republican River Compact, but as this Court has said, "[T]he mere existence of a compact does not foreclose the possibility that we will be required to resolve a dispute between the compacting States." *Texas v. New Mexico*, 462 U.S. 554, 568 (1983).

Nebraska's suggestion (Neb. Brief 18) that *Weiland v. Pioneer Irrigation Co.*, 259 U.S. 498 (1922) provides an example of a "Compact alternative" to the present action is simply a repetition of the federal district court suggestion, which has been refuted above. The same is true of Nebraska's suggestion of a federal district court action against the United States.

Nebraska's suggestion (Neb. Brief 19) that Kansas could construct more storage reservoirs in Nebraska and Colorado is a non sequitur. Kansas' problem is not that it needs more reservoirs – Kansas' problem is that it needs inflows to existing reservoirs.

3. Negotiation and Mediation Have Failed to Resolve the Controversy.

Nebraska admits the existence of one of the basic and continuing disagreements between the States that has prevented progress in negotiations: "Groundwater pumping, Kansas' principal grievance, is not a subject of the Compact. " Neb. Brief 20. Yet, the acreage irrigated by wells drilled in Nebraska after the federal reservoir projects were constructed would appear to be at least 800,000 acres. See Kan. Brief 3, 4, 13. Whether the pumping associated with this acreage is controlled by the Compact is an

issue of major proportions, raising issues of fact and law that must be settled by this Court if they are to be settled at all.

Nebraska claims that it, not Kansas, "suggested, pursued and facilitated negotiations." Neb. Brief 20. This is incorrect. There would have been no discussion, negotiation or mediation, within the Compact Administration or otherwise, but for the efforts of Kansas, the downstream state, to resolve the issues by negotiation.

Nebraska also suggests that Kansas has not pursued a negotiated resolution of this matter in good faith. See Neb. Brief 20-21. Nebraska cites no basis for this accusation. On the contrary, Kansas has attempted to settle the controversy in good faith through the Republican River Compact Administration, and separately through mediated negotiations, as set out in the Kansas Brief (pp. 8-10).

CONCLUSION

The Motion For Leave To File Bill of Complaint should be granted.

Respectfully submitted,

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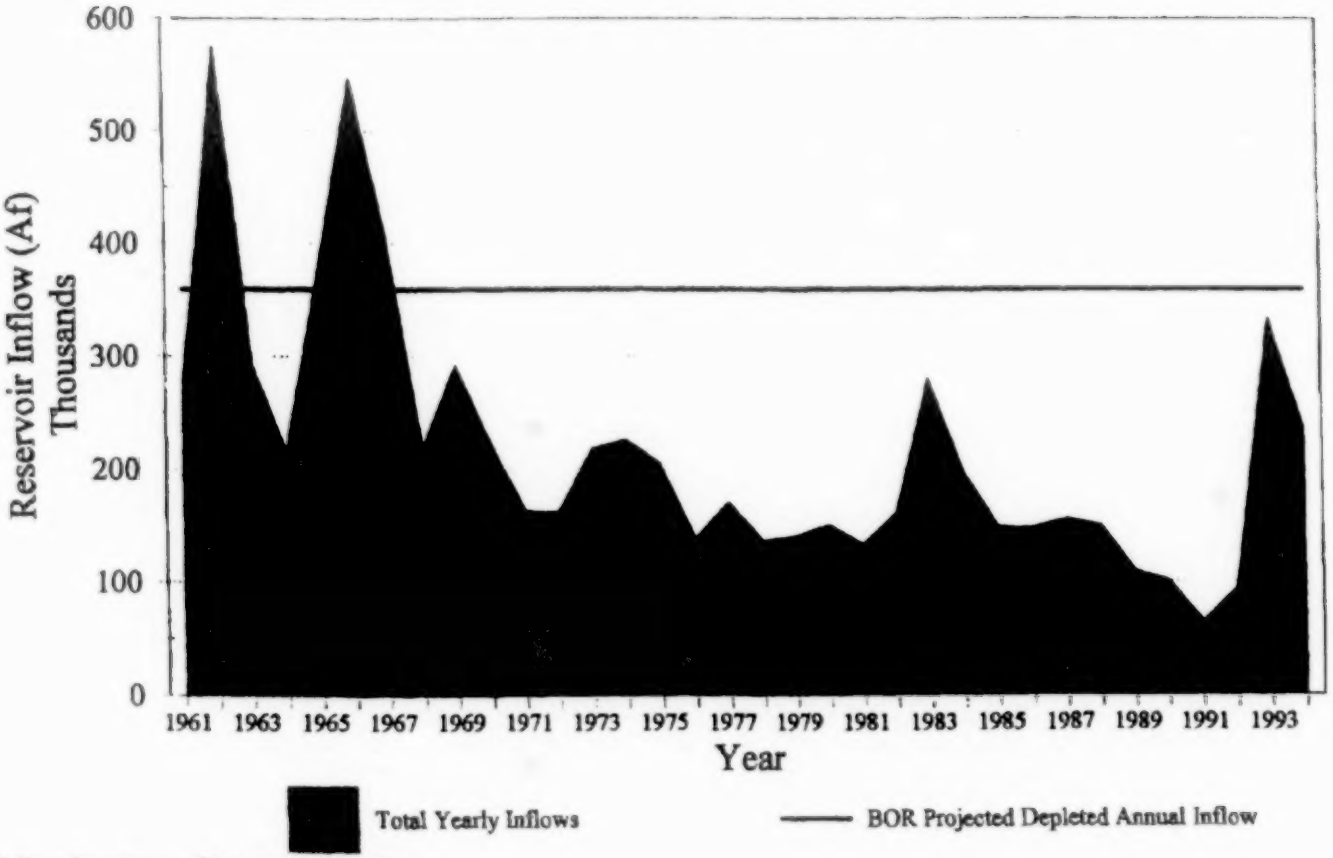
Harlan County Reservoir Inflows

Projected vs. Actual



Yearly Inflows from Bureau of Reclamation Records
BOR Projected Average Inflow from Definite Plan Report, Bostwick Division, Volume 1 Part 3